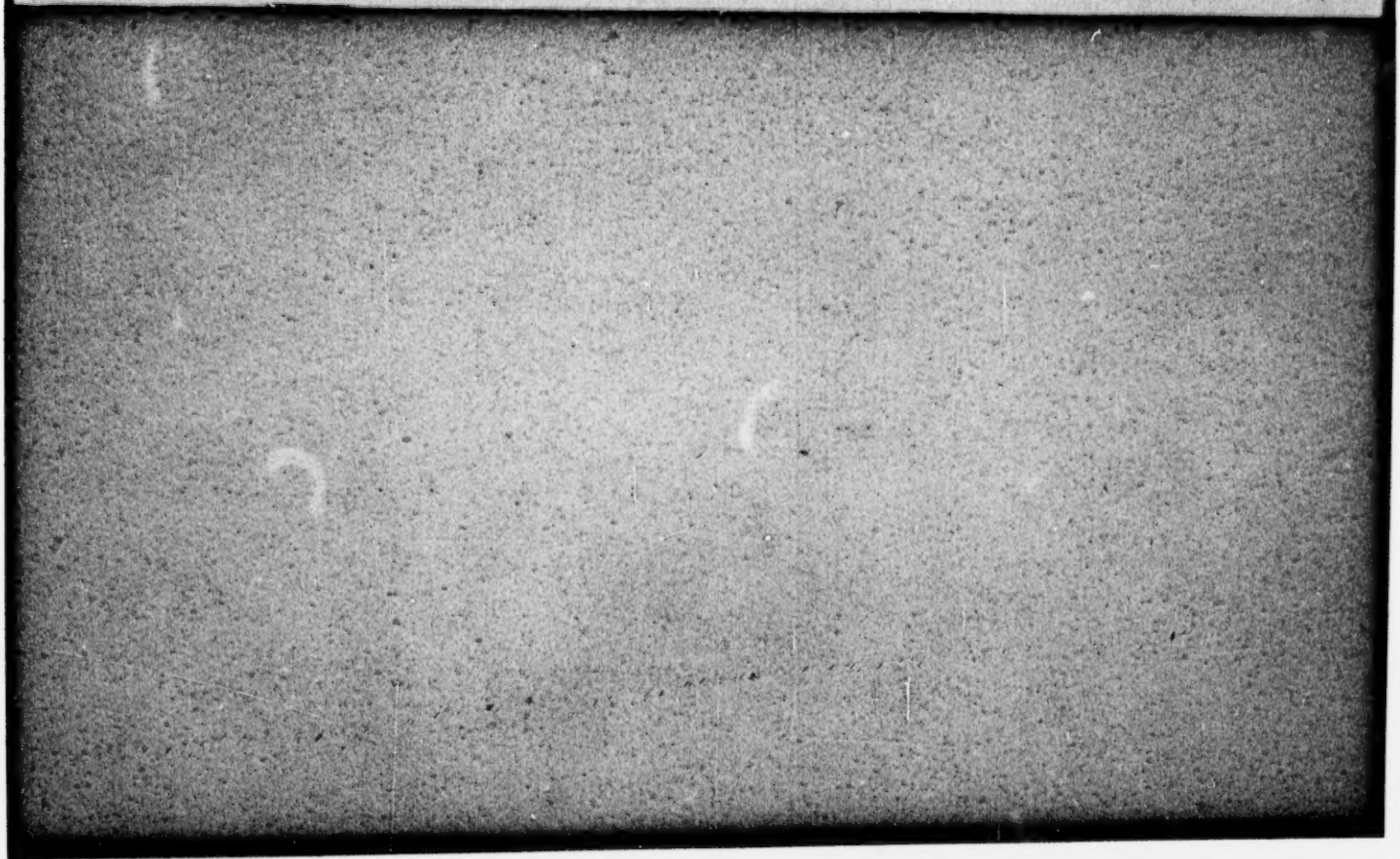

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-570

HERBERT H. DEAN, *Petitioner*,

vs.

FORD MOTOR COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

The decision of the Court of Appeals is correct and the case does not present any important or novel question justifying review by this Court.

The District Court found on the basis of substantial evidence that plaintiff had not applied for a job as foreman. Accordingly, neither the District Court nor the Court of Appeals considered it necessary to determine the hypothetical questions which would have arisen if plaintiff had applied for the job and been rejected.

OPINIONS OF THE COURTS BELOW

Neither the decision of the District Court (Appendix A) nor that of the Court of Appeals (Appendix B) has been reported either officially or unofficially.

JURISDICTION

The judgment of the District Court was entered on September 28, 1973. Petitioner filed a notice of appeal on October 25, 1973. The Court of Appeals affirmed the judgment of the District Court on August 13, 1974. This Court has jurisdiction under 28 U.S.C. 1254.

STATEMENT OF THE CASE

Petitioner's statement of the case is not accurate or complete. Accordingly, we submit the following statement:

Petitioner was employed by Ford Motor Company from July, 1966 to January, 1972. In January, 1972, he filed a complaint with the District Court alleging that he had applied for promotion to foreman in Ford Motor Company in November, 1967 and again in June, 1968 and that he was denied promotion because he was a Negro.*

The case was tried before the District Judge. Petitioner testified that in November, 1967 and in mid-1968 he had submitted written applications for promotion to foreman

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*The complaint also alleged the action was brought as a class action. The Court of Appeals held that "the district court was justified on the basis of the record before it, in finding that the requisites for a class action were lacking" (Appx. B, p. 3). Petitioner has not questioned that holding in his petition for certiorari.

to a person whom he identified as his supervisor at each time—a Mr. Rossi and a Mr. O'Brien. Defendant's evidence discredited petitioner's testimony regarding his alleged applications for promotion and showed that his claims were untrue: Mr. Rossi was not, and could not have been, petitioner's supervisor at or near the time when petitioner claimed to have given him an application. Mr. O'Brien testified that he never received such an application. No application by petitioner for promotion to foreman was found during a search of the Company's records. Also, the District Judge, who had the opportunity to observe the demeanor and candor of all the witnesses, noted other reasons why petitioner's testimony lacked credibility (Appx. A, pp. 3-6).

The District Court, after a full trial, found petitioner had made no such application. Judgment was entered for defendant. The Court of Appeals held that the District Court "correctly applied the rule of *McDonnell Douglas*" (Appx. A, p. 2) and affirmed (ibid., p. 3).

ARGUMENT

The decision of the Courts below are in accord with Title VII of the Civil Rights Act of 1964 (78 Stat. 253) and this Court's decision in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. This Court held in *McDonnell Douglas:*

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a

> racial minority; (ii) that *he applied* and was qualified *for a job for which the employer was seeking applicants;* (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications (411 U.S. 802; emphasis added).

After stating that McDonnell Douglas did not dispute any of the foregoing facts, this Court said:

> "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the *employee's rejection*" (411 U.S. 802; emphasis added).

The District Court's findings (Appx. A) are precisely in accord with the *McDonnell Douglas* decision.

Petitioner did not establish to the satisfaction of the trier of fact "that he applied * * * for a job for which the employer was seeking applicants" (411 U.S. 802). Therefore there was no need to determine the "reason for the employee's [alleged] rejection." The "burden * * * to articulate some legitimate, nondiscriminatory reason for the * * * rejection" can hardly arise if there were no rejection.

A prima facie case can be rebutted by contradiction or explanation. Petitioner's reference to California cases involving the effect of unrebutted testimony (Petition, pp. 5-6) ignores the fact that the testimony of petitioner was contradicted. The trial court, after a full trial, found that petitioner had not made application for promotion to the position of foreman. The issue of whether he might have

been discriminated against, if he had applied, was therefore not before the court.

Under the *McDonnell Douglas* decision, if one of the elements of a prima facie case is completely wiped out, as contrasted with a case in which the employer asserts legitimate reasons to explain a rejection, there is no occasion to reach the pretext issue.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for certiorari should be denied.

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